

Notice of Agency Rule-making Proposal

AGENCY: Department of Professional and Financial Regulation, Office of Licensing and Registration, Real Estate Commission

RULE TITLE OR SUBJECT: Chapter 400, Agency/Designated Broker Responsibilities; Chapter 410, Minimum Standards of Practice

PROPOSED RULE NUMBER: 98-P

(LEAVE BLANK - ASSIGNED BY SECRETARY OF STATE):

CONCISE SUMMARY (UNDERSTANDABLE BY AVERAGE CITIZEN):

This is a request for additional written comment on substantial changes to the proposed rules.

The proposed rules would have: (1) required the designated broker to establish policies relating to the registration of internet domain names and the creation of web sites in the name of a real estate brokerage agency, (2) regulated the circumstances in which a real estate brokerage agency may pay brokerage compensation to an affiliated licensee's legal business entity, (3) established an advertising format for real estate brokerage advertisements, and (4) prohibited an affiliated licensee from registering an internet domain name or creating a web site in the name of the real estate brokerage agency without the knowledge and consent of the designated broker.

Upon consideration of the testimony and comments received on the proposed rules, the Commission instead proposes to: (1) require the designated broker to establish policies relating to the registration of internet domain names and the creation of web sites in the name of a real estate brokerage agency (no change from the proposed rules); (2) not adopt provisions of the proposed rules relating to circumstances in which a real estate brokerage agency may pay brokerage compensation to an affiliated licensee's legal business entity), (3) require that the real estate brokerage agency's trade name be prominently displayed or presented in advertisements, and (4) prohibit an affiliated licensee from registering an internet domain name or creating a web site in the name of the real estate brokerage agency without the consent of the designated broker (re-written but substantively unchanged from the proposed rules).

The Commission requests written comment on these changes to the proposed rules. The text of these changes and an explanation of the reasons for the changes are available on OLR's web site and may be obtained from the agency contact person.

The statement of economic impact on small business required by 5 MRSA §8052(5-A) may be obtained from the agency contact person.

THIS RULE WILL ☐ **WILL NOT** ☒ **HAVE A FISCAL IMPACT ON MUNICIPALITIES.**

STATUTORY AUTHORITY: 32 MRSA §13065 and 13279

PUBLIC HEARING):

(IF ANY, GIVE DATE, TIME, LOCATION)

None

DEADLINE FOR COMMENTS: July 7, 2009

AGENCY CONTACT PERSON: Carol Leighton, Director, Real Estate Commission

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PROPOSED RULE AVAILABLE ON LINE AT: www.maine.gov/professionallicensing

Please approve bottom portion of this form and
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02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION

039 REAL ESTATE COMMISSION

Chapter 400: AGENCY/DESIGNATED BROKER RESPONSIBILITIES

Summary: This chapter details requirements of maintaining a real estate brokerage agency and establishes the specific supervisory responsibilities of the designated broker.

RE-ADVERTISED PROPOSED RULE

The Commission proposes to amend Section 1 of Chapter 400. No other part of Chapter 400 is affected by the re-advertised proposed rule.

STATUTORY AUTHORITY: 32 MRSA §§13065 and 13279

EFFECTIVE DATE:

02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION**039 REAL ESTATE COMMISSION****Chapter 400: AGENCY/DESIGNATED BROKER RESPONSIBILITIES**

Summary: This chapter details requirements of maintaining a real estate brokerage agency and establishes the specific supervisory responsibilities of the designated broker.

1. Responsibilities of Designated Broker**1. Generally**

The designated broker shall supervise the activities of affiliated licensees, the activities of unlicensed persons affiliated with the real estate brokerage agency and the operation of the real estate brokerage agency. The supervision includes, at a minimum, the establishment of policies and procedures that enable the designated broker to review, manage and oversee the following:

- A. The real estate transactions performed by an affiliated licensee;
- B. Documents that may have a material effect upon the rights or obligations of a party to a real estate transaction;
- C. The filing, storage and maintenance of such documents;
- D. The handling of money received by the real estate brokerage agency for the parties to a real estate transaction;
- E. The advertising of any service for which a real estate license is required;
- F. The familiarization by the affiliated licensee with the requirements of federal and state law governing real estate transactions; ~~and~~
- G. The dissemination, in a timely manner, to affiliated licensees of all regulatory information received by the real estate brokerage agency pertaining to the practice of real estate brokerage;
- H. The registration of any domain name for a web site in order to promote real estate brokerage services or the sale or purchase of real estate through the agency; and
- I. The development or uploading to the internet of a web site that promotes real estate brokerage services or the sale or purchase of real estate through the agency.

02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION

039 REAL ESTATE COMMISSION

Chapter 410: MINIMUM STANDARDS OF PRACTICE

Summary: This chapter clarifies and establishes standards for practicing real estate brokerage.

RE-ADVERTISED PROPOSED RULE

The Commission proposes to amend Sections 1 and 13 of Chapter 410 as shown in the attached pages. No other part of Chapter 410 is affected by the re-advertised proposed rule.

STATUTORY AUTHORITY: 32 MRSA §§13065 and 13279

EFFECTIVE DATE:

02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION**039 REAL ESTATE COMMISSION****Chapter 410: MINIMUM STANDARDS OF PRACTICE**

Summary: This chapter clarifies and establishes standards for practicing real estate brokerage.

1. Advertising**1. ~~Definition~~Definitions**

As used in the Commission's rules, unless the context otherwise indicates, the following terms have the following meanings:

- A. ~~Advertise.~~ As used in this Section, the terms “advertise,” “Advertise,” “advertising” and “advertisement” include all forms of representation, promotion and solicitation disseminated in any manner and by any means of communication for any purpose related to real estate brokerage activity, including, at a minimum, advertising the sale or purchase of real estate or promotion of real estate brokerage services conducted by mail, telephone, the Internet, the World Wide Web, E-mail, electronic bulletin board or other similar electronic common carrier systems, business cards, signs, television, radio, magazines, newspapers, and telephonic greetings or answering machine messages.
- B. ~~Contact information.~~ “Contact information” means information as to how the public can contact the real estate brokerage agency either by phone or in person at the agency's place of business as licensed by the Commission.
- C. ~~Prominent.~~ “Prominent” means standing out so as to be seen easily; conspicuous; particularly noticeable.

2.Trade Name

~~Advertising must be done in the real estate brokerage agency's trade name as licensed with the Commission and the trade name must be prominently displayed.~~

3.Contact Information

~~Advertising must include information where the public can contact the real estate brokerage agency either by phone or in person at the agency's place of business as licensed by the Commission.~~

4.Advertising by Affiliated Licensees

~~Advertising by affiliated licensees must be under the supervision of the designated broker. Such advertising may include an affiliated licensee's name and phone number or~~

~~other contact information, provided the real estate brokerage agency's trade name and contact information is also included as required in this Section.~~

4-A. Advertising by Real Estate Brokerage Agencies

Real estate brokerage advertisements must contain the trade name and contact information of the real estate brokerage agency as licensed by the Commission. The trade name and contact information of the agency must be prominently displayed or presented.

In addition, the designated broker may authorize an advertisement that includes the name, telephone number, slogan, logotype or photo of an affiliated licensee or group or team of affiliated licensees as part of the brokerage services being offered by the real estate brokerage agency. The affiliated licensee or group or team of affiliated licensees may not independently engage in real estate brokerage.

5. Written Permission of Owner Required to Advertise

A real estate brokerage agency or its affiliated licensees shall not advertise any real estate for sale without first obtaining the written permission of the owner or the owner's authorized representative.

6. Advertising of Exclusive Listing Held by Another Agency

A real estate brokerage agency or its affiliated licensees shall not publish or cause to be published an advertisement that makes reference to the availability of real estate which is exclusively listed for sale by another real estate brokerage agency unless the licensee obtains the prior written consent of the designated broker who has been authorized by the owner to provide consent.

7. Deception and Misrepresentation Prohibited

Advertising must be free from deception and shall not misrepresent the condition of the real estate, terms of the sale or purchase, real estate brokerage agency policies, or real estate brokerage services.

* * *

13. Licensee's Duty

1. Keep the Designated Broker Informed

An affiliated licensee shall keep the designated broker fully informed of all activities conducted on behalf of the agency and shall notify the designated broker of any other activities that might impact on the responsibilities of the designated broker as required under Chapter 400, Section 1 of the Commission's rules.

2. Provide Documents to Designated Broker

An affiliated licensee must provide originals or true copies of all real estate brokerage documents and records prepared in a real estate transaction as listed in Chapter 400,

Section 3 of the Commission's rules to the designated broker within 5 calendar days after execution of the document or record.

3. Domain Names and Web Sites

An affiliated licensee may not directly or indirectly, through himself or others—

- register a domain name for a web site, or
- develop or upload to the internet a web site,

that promotes real estate brokerage services or the sale or purchase of real estate through the agency with whom the licensee is affiliated without the consent of the designated broker.

Any web site developed or uploaded under this Section must comply with the advertising requirements contained in Chapter 410, Section 1.

Real Estate Commission

Explanation of Changes From Proposed Rules Heard on March 26, 2009

Response to Comments on Proposed Amendments to Chapters 400 and 410 (Part 1)

Chapter 400, Sections 1(H) and (I)

(Designated broker responsible for overseeing registration of domain names and development of web sites in the name of the agency)

COMMENTERS

Thomas Coward, Keller Williams Realty (oral and written)
Daniel Fortin, Keller Williams Realty Mid Maine (oral and written)
Geoff MacLean (oral and written)
Paul McKee, Keller Williams Realty Mid Maine, (oral and written)
Leanne Nichols, Keller Williams Realty (oral and written)
Dan Walker, Preti, Flaherty, Beliveau & Pachios (oral and written)
Wendell Whitacre, Keller Williams Realty (oral and written)

SUMMARY OF COMMENTS

These commenters supported the proposed rule.

COMMISSION RESPONSE

No response is necessary.

Chapter 400, Section 6(3)

(Affiliated broker's business entity may receive brokerage compensation if the entity "was formed for the sole purpose of receiving brokerage compensation for tax purposes and will not engage in any other business or receive compensation from any other business venture")

COMMENTERS

Thomas Coward, Keller Williams Realty (oral and written)
Dan Fortin, Keller Williams Realty Mid Maine (oral and written)
James Gray, Keller Williams Realty (oral)
Brad Knowles, Keller Williams Realty Mid Maine (oral)
Cathleen Manchester, Keller Williams Realty (oral)
Paul McKee, Keller Williams Realty Mid Maine (oral and written)
Geoff McLean (oral and written)
Sue Meservier, Keller Williams Realty Mid Maine (oral and written)
Leanne Nichols, Keller Williams Realty (oral and written)
Mark Richard, Keller Williams Realty (oral)
Jed Rothband, Keller Williams Realty (oral)

Kathleen Szostek, Keller Williams Realty Mid Maine (oral)
Dan Walker, Preti Flaherty Beliveau & Pachios (oral and written)
Wendell Whitacre, Keller Williams Realty (oral and written)
Kim Coit, Re-Max (written)

SUMMARY OF COMMENTS

There was no objection to portions of Section 6 other than Section 6(3). The commenters opposed Section 6(3) as being needlessly restrictive.

The key point of Section 6 is that any business entity created by an affiliated licensee to receive brokerage compensation may not itself engage in real estate brokerage. This the commenters did not object to. However, it is unnecessary for the accomplishment of this purpose that the proposed rule prohibit the business entity from receiving compensation earned by the affiliated licensee from other sources.

Licensees may receive income from rental properties, property management, consulting and teaching. (Coward, Fortin, MacLean, Manchester, Walker) One licensee has been paid seven different ways this year. (Knowles) One licensee operated his political consulting business as a sole proprietorship before becoming a sales agent and now wishes to receive his real estate brokerage income through the same company. (Rothband) These income streams are not regulated by the Commission, other than to require compliance with conflict of interest rules. (Walker) There are many advantages to the licensee if all income earned by the licensee is payable to one business entity. (MacLean) "It seems like if there are multiple flows of revenue flowing thru this entity it supports the thought process that the entity has been established for tax purposes only because the entity itself couldn't possibly be engaging in multiple business ventures rather it's the individuals of the entity whom are then required to follow the rules and regulations of the various businesses they engage in." (Nichols) The costs and administrative burdens of creating a separate entity for each income stream are not worthwhile to anyone. (Coward, Knowles) The Commission will have a major enforcement issue on its hands if a licensee's business entity may not receive profits from other sources. (Richard) The proposed rule does not further the purposes of the Commission as stated in statute¹ or on the Commission's web site (McKee, Nichols) and will not serve the public. (Gray, McKee, Nichols)

"Licensees that choose to set up business entities for tax purposes likely do so for all of their business pursuits, not just for the tax treatment of their brokerage commission. To require that licensees set up separate business entities for such purposes places a burden on licensees that does not further any legitimate purpose of the Commission. The fact that brokerage commissions may be paid to a business owned by a licensee that receives other fees for other services does not jeopardize any protection afforded to the general public engaging the services of an agency. Likewise, prohibiting licensees

¹ Title 32 MRSA §13061 states, "It is the declared policy of the State that licensees shall be supervised by the Real Estate Commission in a manner to ensure that they meet standards which will promote public understanding and confidence in the business of real estate brokerage."

from using one business entity for tax reasons does not provide further protection to the interests of the general public.” (Walker)

One commenter (Coward) proposed the following alternative language for the proposed rule:

3. That the business entity was formed for ~~the sole legal~~ purpose or purposes, at least one of which is of receiving brokerage compensation for tax purposes ~~and will not engage in any other business or receive compensation from any other business venture.~~

COMMISSION RESPONSE

Comments not accepted. The commission withdraws proposed Section 6 in its entirety.

In the early 1990s the Commission, through its Deputy Director, issued an opinion on payment of brokerage compensation to a corporation, wholly-owned by the real estate licensee who earned the compensation, which corporation was formed solely for tax purposes. The opinion notes that such payments are, technically, a violation of the Real Estate Brokerage License Act, but implies that the Commission will not take action against a licensee in such circumstances if the licensee and designated broker have a written agreement stating that commission payments will be paid to the corporation for tax purposes only and not as an attempt to circumvent the licensing law. The opinion, by its terms, “applies only to corporations formed solely for tax purposes, and does not apply to other business corporations that might be formed by a licensee.” An explicit premise of the opinion is that “the corporation did not conduct the brokerage activity.”²

The proposed rules, in Chapter 400, Section 6, would have formalized this opinion by making it a part of the Commission’s rules. The first and last paragraphs of section 6 would have continued to require a written agreement with the designated broker. Section 6(2) would have recognized limited liability companies and other business entities as well as corporations. Sections 6(4) and (5) would have prohibited the affiliated licensee’s business entity from performing or advertising real estate brokerage services or receiving referral fees or brokerage compensation except from the supervising agency. None of this elicited any adverse reaction in this rulemaking proceeding. The flashpoint for opposition was Section 6(3):

3. That the business entity was formed for the sole purpose of receiving brokerage compensation for tax purposes and will not engage in any other business or receive compensation from any other business venture.

Section 6(3) restated the limited scope of the Commission opinion discussed above: business entities formed solely for tax purposes and not other business entities formed by an affiliated licensee. However, the testimony summarized above shows that many licensees seek to have brokerage compensation payable to business entities that were not formed solely for tax purposes and that engage in a variety of business activities for which no real estate license is required. This goes far beyond the concept of corporation

² This opinion may be read on the Commission’s web site at http://www.maine.gov/pfr/professionallicensing/professions/real_estate/pdf/CommissionPmt.pdf.

as tax alter ego of the affiliated licensee envisioned in the Commission opinion, and may invoke the prohibition in 32 MRSA §13067-A(8) against payment of real estate brokerage compensation to unlicensed persons.³

Teams of affiliated licensees were largely unknown when the Commission opinion was issued. Now, many agencies have adopted this business model, and teams are common. The Commission opinion addresses the prospect of a business entity *wholly-owned* by an affiliated licensee receiving brokerage compensation earned by the licensee. Proposed Section 6(1) is less precise, requiring only that the affiliated licensee have “an ownership interest in the business entity.” This leads to the prospect of a business entity owned by multiple affiliated licensees or other, unlicensed, individuals receiving compensation for brokerage compensation earned by one owner of the business entity. Such arrangements invite scrutiny by Maine Revenue Services into the tax treatment of professional service income assigned to a corporation or, in some cases, may involve the impermissible sharing of brokerage compensation with unlicensed individuals.

In short, the proposed addition of Chapter 400, Section 6 opened Pandora’s Box. In proposing Section 6, the Commission did not intend to encourage receipt of brokerage compensation by business entities beyond that recognized in the Commission opinion. It is clear to the Commission that adoption of Section 6, with or without Section 6(3), will have the opposite effect. For this reason the Commission does not adopt Section 6.

It is also clear that some licensees have created business entities that engage in activities beyond what is described in the Commission opinion. The Commission intends to withdraw that opinion upon the conclusion of this rulemaking proceeding. Notwithstanding the Commission’s withdrawal of that opinion, it does not intend to impose disciplinary sanctions against licensees who, by written agreement between the licensee and agency, agree that brokerage compensation owed to the licensee may be paid to a corporation solely owned by the licensee which has not engaged in any real estate brokerage activity or any other business purposes.

Chapter 400, Section 7

(“Payment of brokerage compensation to an affiliated licensee or an affiliated licensee’s legal business entity may only be made by the agency. No third-party payment is permitted.”)

COMMENTERS

Tanya Busch, Keller Williams Realty Mid Maine (oral and written)
Thomas Coward, Keller Williams Realty (oral and written)
Jason Dube, Keller Williams Realty Greater Portland (written)
Tom Ferent, Keller Williams Realty (oral)
Dan Fortin, Keller Williams Realty Mid Maine (oral and written)

³ Under 32 MRSA §13067-A(8), a licensee risks disciplinary action for “Offering, promising, allowing, giving or paying, directly or indirectly, any part or share of compensation arising or accruing from a real estate brokerage transaction to any person who is not licensed to perform the service for which the person is or would be compensated, if a license is required under this chapter for performance of that service.”

Geoff MacLean (oral and written)
Cathleen Manchester, Keller Williams Realty (oral)
Paul McKee, Keller Williams Realty Mid Maine (oral and written)
Sue Meservier, Keller Williams Realty Mid Maine (oral and written)
Steve Morgan, Keller Williams Realty (oral and written)
Leanne Nichols, Keller Williams Realty (oral and written)
Mark Richard, Keller Williams Realty (written)
Kathleen Szostek, Keller Williams Realty Mid Maine (written)
Dan Walker, Preti Flaherty Beliveau & Pachios (oral and written)
Wendell Whitacre, Keller Williams Realty (oral and written)
Kim Coit, Re-Max (written)

The commenters opposed the proposed rule. As written, the proposed rule can be read as prohibiting the practice whereby a title company disburses the affiliated broker's commission to the affiliated broker from payment proceeds at time of closing. These disbursements are authorized by the brokerage. The title company in effect acts as the brokerage's agent, similar to a payroll company, in paying to the affiliated licensee the compensation due the affiliated licensee from the brokerage. The advantage of this method is that the affiliated licensee gets paid right away. (MacLean)

As agent of the brokerage, the title company is not a "third party payor" for purposes of the proposed rule. (Coward, MacLean, Nichols) Rather, commissions are paid from the agency's own funds with written authorization in a precise dollar amount given to the title company. (Busch, Coward) "It is a common practice at some Maine real estate agencies to authorize, in writing, the closing company or escrow agent conducting a closing to disburse the agency's commission in the form of one or more checks, with appropriate amounts going to the agency, the affiliated licensee, and possibly a co-brokering agency, as appropriate. This transaction is entirely transparent..." (Coward) A better analogy than the payroll company is that of the agency giving a check to its affiliated licensee. (Coward) Or the agency asking its accountant to cut a check. (Manchester) The title company is disbursing funds, not paying them, and for that reason would not fall within the prohibition of the proposed rule. (Busch, Morgan) Disbursement of agent commissions by the title company is similar to disbursement of water/sewer, tax proration, contractors, etc. all found on the HUD sheet. (Busch, Morgan) "They're just eliminating a task that the agency won't have to do." (Dube)

Keller Williams has been engaging in the practice described above for six years. (Walker, Nichols) To the extent the proposed rule seeks to prohibit the practice, it embodies an unnecessarily narrow interpretation of 32 MRSA §13067-A(8).⁴ Section 13067-A(8) prohibits an affiliated licensee from accepting brokerage compensation from a third party. Section 13067-A(8) does not prohibit an agency from paying its own affiliated licensees via a third party such as a title company. (Walker) "Pursuant to this statute, the designated broker of Keller Williams has been legally compensating their agents by authorizing the escrow agents to disburse Keller Williams funds to the Keller Williams agents at closing. The Keller Williams agents are not being compensated by anyone other than Keller Williams. The above rule change would improperly make this

⁴ Section 13067-A(8) provides, in relevant part, "A licensee may not be employed by or accept brokerage compensation from any person other than the agency under which the licensee is at the time licensed."

legal activity illegal.” (Walker) The proposed rule may not be necessary inasmuch as §13067-A(8) requires licensees to accept compensation from their agency only. (Coit) So long as the agency is properly tracking commission payments, supervising its affiliated licensees and issuing them Form 1099s, there is no reason to prohibit an agency from instructing a title company to disburse commission payments owed at time of closing. (MacLean, Walker) Accountability for such payments is part of the supervisory responsibilities of the designated broker. (Walker)

One commenter asked if the proposed rule was a reaction to “something not working properly, or a response to complaints received by the Commission. (McGhee) One commenter asked, “Perhaps the complaining title companies are merely lazy and don’t want to be inconvenienced?” (Whitacre)

Because the affiliated licensee has finished his/her job by the time of closing, it makes sense for the affiliated licensee to receive the commission due him/her at time of closing. (Dube, Richard) One commenter stated that at a brokerage he worked for prior to affiliating with Keller Williams, commissions wouldn’t be paid until three days to a week after closing. He would frequently be checking with the main office to find out the status of his commission payments. At Keller Williams, under the practice described above, he gets paid immediately. (Ferent)

Distribution of commissions by a title company at time of closing is an accepted practice nationwide. The IRS permits this, and there is no need for a more restrictive rule by the Commission. (Busch) So long as such payment is authorized by the agency, where is the harm? (Nichols, Richard) The proposed rule does not advance public safety. (Richard, Walker) “Just because it’s a good thing for realtors doesn’t mean it’s a bad thing for the public.” (Ferent) Mortgage fraud and short sales are serious problems that should command the Commission’s attention, not disbursement of commissions by title companies at closing. (Busch) One commenter was suspicious of Keller Williams being targeted by Commission members who work at other agencies that do not disburse commissions to affiliated licensees at closing. (Busch)

“The monies being dispersed at the closing belong to the brokerage agency, which has the authority to disperse their funds to their licensed agents at the closing by the current rules and laws. The consumer has no complaint here, and the ‘third party’ doesn’t exist. It does take an efficiently-run agency to be able to do this; however, the proposed change benefits no one other than the broker-owners who do not like to have to compete with the agencies who do disperse at closings. This is a self-serving rule that restricts the competitive nature of the business, and serves no consumer purpose.” (Fortin)

Commenters offered the following fixes or alternatives to the proposed rule:

- “Amend this section to add language that states that an agency authorizing a title company or closing agent in writing to disburse any portion of its commissions earned to an affiliated licensee or its legal business entity is NOT a third party payment.” (MacLean)

- Amend the proposed rule to read (Walker):
 7. Payment of brokerage compensation to an affiliated licensee or an affiliated licensee's legal business entity may only be made by the agency. No third party payment is permitted. An agency authorizing a title company or closing agent in writing to disburse any portion of its commissions earned to an affiliated licensee or its legal business entity is not a third party payment.
- Amend the proposed rule to read (Coward):
 7. Payment of brokerage compensation to an affiliated licensee or an affiliated licensee's legal business entity may only be made by the agency. No third party payment is permitted. Payment of brokerage compensation from funds due to the agency, by a closing company or escrow agent conducting a real estate closing, to an affiliated licensee or an affiliated licensee's legal business entity, upon the express written authorization of the agency, shall not be considered to be a violation of this provision.
- Add a proviso that "third party payor" does not include a title company that acts in an administrative capacity authorized by the agency (Nichols)
- Add the sentence, "Title companies should be able to cut one check to the agency and one to the agent at time of closing." (Fortin)
- Proposed Utah legislation, H.B. 86, 1st Sub. (2009 General Session) (MacLean)
- Adopt a rule that the agency issue written authorization regarding disbursement from a title company (Coit)

COMMISSION RESPONSE

Comments accepted in part. The Commission withdraws proposed Section 7 in its entirety.

Payment of brokerage compensation by settlement agents directly to affiliated licensees results in multiple entries on the HUD settlement statement at time of closing. This raises the possibility of confusing sellers who might not immediately understand that brokerage compensation paid by them to the real estate brokerage agency was paid by the agency to one or more affiliated licensees. The proposed rule also reflected protests made by settlement agents who balked at the administrative burden of apportioning brokerage compensation at the closing. The purpose of the proposed rule was to end the practice of direct payment of brokerage compensation to affiliated licensees at closing.

The prohibition in the proposed rule against payment of brokerage compensation by third parties was based on the prohibition in 32 MRSA §13067-A(8) against licensees accepting brokerage compensation "from any person other than the agency under which the licensee is at the time licensed." Acceptance of brokerage compensation by an affiliated licensee from a settlement agent without authorization from the designated broker on behalf of the agency may fall within this prohibition, and the proposed rule was intended to prevent this.

The commenters advance a plausible interpretation of §13067-A(8) to deal with the scenario discussed above, i.e., that the settlement agent functions only as the agent of the designated broker in directly paying the affiliated licensee, and that appropriate safeguards can be fashioned to assure that direct payment is: (a) authorized in writing by the designated broker, (b) properly accounted for for payroll and tax purposes, and (c) clearly identified on the settlement statement as brokerage compensation received by the real estate brokerage agency. Under this reading of §13067-A(8), the affiliated licensee is accepting compensation from the agency under which s/he is licensed, albeit indirectly, and not from a person other than the agency.

The commenters have convinced the Commission that payment of brokerage compensation by settlement agents to affiliated licensees when the conditions of the foregoing paragraph are met does not violate §13067-A(8). However, the Commission sees no need to incorporate this conclusion into its rules. Other scenarios may arise in the future that are less clear than the one addressed by commenters in this rulemaking proceeding. The Commission is unwilling to formulate in its rules a catalog of situations under which an affiliated licensee's receipt of a check from a person other than a real estate brokerage agency may or may not violate the statute. The statutory safe harbor recognized in this document is all that is necessary for now.

The Commission emphasizes that nothing in 32 MRSA §13067-A(8) *requires* settlement agents to pay brokerage compensation directly to affiliated licensees. This is a matter for determination by the settlement agent and the real estate brokerage agency.

Chapter 410, Sections 2 (amend), 4 (repeal) and 4-A (new)

(Permit advertising by affiliated licensees, groups and teams; replace the requirement that the agency's trade name be "prominently displayed" with specific formatting rules dealing with the relative prominence of the agency's trade name/contact information and the name and telephone number of the affiliated licensee, group or team)

COMMENTERS

Tanya Busch, Keller Williams Realty Mid Maine (oral and written)
Jean-Marie Caterina, Keller Williams Realty (oral)
Kim Coit, Re-Max (oral and written)
Thomas Coward, Keller Williams Realty (oral and written)
Jason Dube, Keller Williams Realty Geoff McLean (written)
Tom Ferent, Keller Williams Realty (oral)
Dan Fortin, Keller Williams Realty Mid Maine (oral and written)
Brenda Fontaine, ERA Waterville (oral)
Marc Gup, Keller Williams Realty (oral)
Janice Jacques, Keller Williams Realty Mid Maine (oral and written)
Geoff MacLean (oral and written)
Cathleen Manchester, Keller Williams Realty (oral)
Deborah Meek, Keller Williams Realty (oral)
Paul McKee, Keller Williams Realty Mid Maine (oral and written)
Mike Meservier, Keller Williams Realty Mid Maine (oral and written)
Sue Meservier, Keller Williams Realty Mid Maine (oral and written)
Steve Morgan, Keller Williams Realty (oral and written)
Leanne Nichols, Keller Williams Realty (oral and written)
Mark Richard, Keller Williams Realty (oral)

Janice Selig, Allen & Selig Realty (oral)
Anne Servidio, ERA Worden (oral)
Dan Walker, Preti, Flaherty, Beliveau & Pachios (oral and written)
Kelly Webb, Keller Williams Realty Mid Maine (oral)
Tim Wood (sp?) (oral)
Wendell Whitacre, Keller Williams Realty (oral and written)

SUMMARY OF COMMENTS

The rules appropriately recognize groups and teams of affiliated licensees. (Busch, Caterina, Coward, Meek, Nichols) In all other respects, the commenters opposed the proposed rule. The proposed rule unreasonably restricts agencies from competitively differentiating themselves in advertising. (MacLean, Fortin, Walker) The law states that advertising must be in the trade name of the agency. The current rule requires that the agency's trade name be prominently displayed. This is similar to immediately noticeable, or noticeable. "Prior to the 2006 rule change to prominent, we did not have these competitor complaints. So let's just adhere to the letter of the law which requires the trade name of the agency to be noticeable." (MacLean quoted; also Busch)

Use of the word "adjacent" in the proposed rule will also impede agencies who want to competitively lay out their advertising. The dictionary definition of "adjacent" has a range of meanings. If adjacent is interpreted to mean close proximity, how is this any easier than determining what is "prominent?" If adjacent is interpreted to mean nothing in between the licensee's name and the trade name of the agency, much of today's current advertising will not be in compliance with the proposed rule. (MacLean, Walker) "The proposed regulation would also ban many simple and effective advertising layout choices, such as putting the licensee contact information at the top of a sign or advertisement and the agency information prominently at the bottom; or having a large group ad with the agency name at the top, and the listings of multiple affiliated licensees underneath. In short, the specificity of this proposed Rule will stifle creativity, result in unnecessarily unattractive advertising, and will not necessarily 'promote public understanding and confidence in the business of real estate brokerage.'" (Coward)

The restrictions on type face and type style will further stifle creativity. (MacLean, Walker) "The proposed rule that regulates type face and type style of creative advertising of competitors in an industry appears unnecessary given the lack of consumer complaints with the current advertising of agencies and the option to require only that the trade name and its contact information be immediately noticeable to the public." (MacLean) "Prominent" equates to "noticeable." The proposed rule should be amended to require only that the trade name be noticeable. (Caterina, Dube Manchester, Nichols, Selig, Walker) Either enforce the current rule, go back to "noticeable" or consider the Utah model. (Busch)

Other suggestions: "I would strike out bullets A, B, C and replace with '...real estate brokerage agency must be immediately noticeable.'" (Whitacre quoted; also Coward) The current rule (trade name must be prominently displayed) should be left in place. (Coit, S. Meservier) "Remove 'prominently' from 410 1.2 and the existing rule works!"

(Fortin) Use “no less prominent,” “at least as prominent” or “more prominent than” and develop non-binding guidelines. (also Coit)

“To the knowledge of Keller Williams, the proposed rule has not originated from any complaints from the public alleging confusion about the identity of an agency responsible for the advertisement. Instead, this rule seems to have originated from agencies that do not want to compete with agencies that legally allow their affiliated licensees to promote themselves individually or in teams.” (Walker quoted; also Busch, Caterina, Coward, Fontaine, Fortin, Nichols, McKee) This should not be a priority issue for the Commission. Other matters, such as short sales, the foreclosure crisis and the Commission’s 2-year backlog in hearing consumer complaints are more important. (Fortin, Wood,) Maine ranks in the bottom quartile of small business. The proposed rule will hurt small business. (Richard)

The type size restriction of the proposed rule will make many advertisements misleading. One commenter showed her badge and her jacket, which bore a Keller Williams logo much smaller than her name on the badge or her team name on the jacket. (Manchester) The type size and type face restrictions will not protect the public, but will require licensees struggling to make a living to acquire new signs, new jackets and new badges. (Manchester) One affiliated licensee noted that the agency name is always on her signs and ads, and that is enough. (Caterina)

All associate brokers are independent contractors. The associate broker pays for his/her own advertising and promotes him/herself personally. A designated broker at a previous agency encouraged one commenter (Jacques) to brand herself. This commenter put her golden retriever on all her advertising. “The dog hasn’t sold any houses, but has sure generated plenty of leads.” (paraphrase) Prominent, noticeable or recognizable are all the same concept. Requiring an agency name to be equal in size to the name of the affiliated licensee is now unfairly changing the game. (Jacques) Telling agents they can’t brand is a turnaround. (McKee) One commenter submitted copies of badges and business cards and a web site on which the name of the affiliated licensee was larger than the name of the agency. (Jacques; materials included in hearing record) It is the same with letterhead, envelopes and internet advertising. (Jacques) This is also typical of insurance agents. (Webb) You know all your professionals by name, not by the name of their practice. (Richard)

Some franchises are templated, which further restricts the ability of an affiliated licensee to comply with the proposed rule. (Jacques) Keller Williams, for example, requires red signs that abide by certain style guidelines. These are available through sign vendors authorized by Keller Williams. For an affiliated licensee who sells vacation homes to out-of-state buyers, it is an advantage for clients to recognize his signs as similar to those they have seen in their home states. (Ferent) The designated broker is responsible for supervising advertising by affiliated licensees, and the designated broker should have guidelines on self-promotion. (Servidio)

One commenter described how at a prior agency, only the agency was advertised. He, as an affiliated licensee, couldn’t put his photo on a business card. At his current

agency, he is able to promote himself. The restrictions in the proposed rule will squelch the concept of what it means to be a small business. The proposed rule will make it difficult for him to distinguish himself from other brokers. The commenter wants the public to know who he is as an individual, especially if he ever changes agencies. (Gup, also Richard, Webb) Agents branded themselves with the encouragement of designated brokers. The commenter changed her signs once to comply with the prominence requirement and doesn't want to do so again. (Fortaine) Another commenter spent \$4,000 in January for new signs. She estimates that it would cost her \$10,000-\$14,000 to replace all her signs and marketing materials if the proposed rule is adopted. "Forcing good agents out of the business because they cannot afford to keep up with unnecessary changes to rules changes imposed by the Commission every 2 years reduces competition and choice and is contrary to the public interest." (Busch) "Allowing this ruling to stand would cost all agents much time and money to comply. In this current economy, most of us are already struggling to survive. Adding this to our already over-governed state of business would cripple us right now." (Fortin)

The proposed rule is unworkable with respect to internet advertising. An affiliated licensee's internet advertisement may be distributed to other sites without the licensee's knowledge or consent. The licensee has have no control over the appearance of an ad when this occurs. (Ferent) The proposed rule will make internet advertising nearly impossible. Technology sites and methods such as Virtual Tours, LinkedIn, blogging, Craigslist, Postlets, Google Base, Yahoo Classifieds, FaceBook and individual property websites from REALTOR magazine and REALTOR.com use a template format. "We create an account and fill in the blanks for a user profile. We as Agents have no control where the phone number or where the address is located with regards to the company name or log. The type style, type size, more prominent, less prominent certainly falls out of the agent's control as well." (M. Meservier quoted, also Coward) You can advertise an open house on FaceBook, but can't include a logo for the realtor. (McKee)

The proposed rule is tremendous over-regulation. The names on a sign don't matter. People will just call the telephone number on the sign. Font size, adjacency, agency name or team name are unimportant. The person who calls doesn't care who answers the phone. (Morgan) Or, a customer may contact an affiliated licensee and not care which agency the affiliate is with. (Webb)

There is no consumer deception. The proposed rule is a waste of time. (Morgan) Licensees should be spending time with clients or on things that matter. The proposed rule doesn't matter. (Busch, Meek, S. Meservier)

There *is* confusion in the marketplace. (Coit) This commenter saw the name of an affiliated licensee prominently displayed on one sign and thought that the licensee had opened his/her own brokerage. When groups adopt their own logos and color schemes, sometimes it's hard to tell the difference between a group and a brokerage. The proposed rules, however, are not the best answer to the problem. The adjacency and font size provisions are too restrictive for layouts and may not square with franchise standards. Also, large group and team names are easier on weak eyes. The commenter recommended leaving the current standard in place (trade name must be prominently

displayed), and further recommended that the Commission issue guidelines to interpret it. (Coit)

Two commenters wished to do away with the designated broker/affiliated licensee model. (Caterina, Richard) There is no such thing as a “designated social worker” or “designated teacher.” (Caterina)

COMMISSION RESPONSE

Comments (other than the last) accepted for the reasons given. The Commission is persuaded by the testimony and comments that the formatting restrictions in proposed Chapter 410, Section 4-A(A), (B) and (C) are unduly rigid and cumbersome. These restrictions would hamper licensees’ ability to design creative advertising and distinguish themselves from competitors.

A number of commenters stated that the purpose of the proposed rule could be accomplished by less restrictive means. Chapter 410, Section 2 currently requires that the trade name of the real estate brokerage agency be “prominently displayed.” Some commenters urged the Commission to leave this standard in place, or adopt another descriptive standard such as “noticeable” or “immediately noticeable.” Discomfort with subjective labels of this type is what led the Commission to propose the objective standards in Section 4-A(A), (B) and (C). What is “prominent” to one person may not stand out at all to another. However, the uncertainty can be reduced by defining the term used.

One definition of “prominent” is “standing out so as to be seen easily; conspicuous; particularly noticeable.”⁵ An advertisement with the trade name and contact information of the real estate brokerage agency prominently displayed or presented, as defined above, will be sufficient to notify a prospective buyer or seller that the agency, not the affiliated licensee or team, is the entity responsible for brokering the transaction.

To accomplish this purpose, Section 1 of this chapter has been re-cast as a Definitions section and the definition of “prominent” quoted above has been included as Section 1(C). Section 2 is deleted in its entirety, and new Section 4-A has been re-written to read:

4-A. Advertising by Real Estate Brokerage Agencies

Real estate brokerage advertisements must contain the trade name and contact information of the real estate brokerage agency as licensed by the Commission. The trade name and contact information of the agency must be prominently displayed or presented.

In addition, the designated broker may authorize an advertisement that includes the name, telephone number, slogan, logotype or photo of an affiliated licensee or group or team of affiliated licensees as part of the brokerage services being offered by the real estate brokerage agency. The

⁵ Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc.
<http://dictionary1.classic.reference.com/browse/prominent> (accessed: May 06, 2009).

affiliated licensee or group or team of affiliated licensees may not independently engage in real estate brokerage.

The restrictions in Section 4-A(A), (B) and (C) of the proposed rule on adjacency, type size, type face and type style have been dropped.

Chapter 410, Section 13

(Adds headings to existing Sections 13(1) and (2); adds new Section 13(3); which prohibits affiliated licensees from registering domain names or developing web sites in the name of the agency without the knowledge and consent of the designated broker. States that any web site must comply with the advertising requirements of Chapter 410, Section 1.)

COMMENTERS

Thomas Coward, Keller Williams Realty (written)
Dan Fortin, Keller Williams Realty Mid Maine (written)
Geoff MacLean (written)
Wendell Whitacre, Keller Williams Realty (written)
Carolyn Fish, Re-Max (written)
Kim Coit (written)

SUMMARY OF COMMENTS

“These changes simply spell out current responsibilities.” (MacLean) “I support these changes, again, because they help clarify, not restrict the duties and responsibilities of our designated brokers and licensees.” (Fortin) “I support this.” (Whitaker)

“Consideration must be given to the nature of Internet advertising in applying proposed Rule 410(13)(3).”

“The proposed addition of the Rule is salutary, as it makes clear that the Designated Broker must ultimately be in control of the advertising done by affiliated licensees on behalf of the agency. I do not advocate any changes to this proposed Rule as such. I would, however, urge the Commission to be mindful of the interconnected nature of Internet advertising, and the frequent practice of websites to be linked again and again with other websites. The result is that advertising placed by an agency on one website may (and almost certainly will be) picked up by other Websites. In the process, the content may be altered and information may be stripped off, all outside the control of the agency or its affiliated licensees. I would hope that the Commission will take this process into account, and realize that although a licensee may take all due care in preparing advertising that is in full compliance with Commission Rules, by the time the advertising reaches the remote corners of the Web, it may be altered [in] surprising ways, for which the licensee should not be held accountable.” (Coward)

“Is it MREC’s intent to extend the rules to sub-websites and domain names that could exist as a result of creating a ‘discussion’ or ‘group’ under web-based social media like Twitter, Facebook, LinkedIn, etc.” Or do the advertising rules not apply because these are private group memberships not soliciting to the general public? (Fish)

Commenter Coit suggests that the first two paragraphs of Section 13(3) be re-written as shown below. (For purposes of comparison, the language of the proposed rule appears first.)

Section 13(3) as proposed (first two paragraphs)

An affiliated licensee may not directly or indirectly, through himself or others, register a domain name for a web site in order to promote real estate brokerage services or the sale or purchase of real estate through the agency with whom the licensee is affiliated without the knowledge and consent of the designated broker.

An affiliated licensee may not directly or indirectly, through himself or others, develop or upload to the internet a web site that promotes real estate brokerage services or the sale or purchase of real estate through the agency with whom the licensee is affiliated without the knowledge and consent of the designated broker.

Suggested re-write of Section 13(3) (first two paragraphs)

An affiliated licensee may not directly or indirectly through himself or others:

1. register a domain name for a web site; or
2. develop or upload to the internet a web site;

that promotes real estate brokerage services or the sale or purchase of real estate through the agency with whom the licensee is affiliated without the knowledge and consent of the designated broker.

COMMISSION RESPONSE

Comments accepted. Section 13(3) does not exempt internet advertising from the requirement that real estate brokerage advertisements prominently display or present the trade name and contact information of the real estate brokerage agency. The Commission understands that a licensee may not always be able to control how advertisements appear when they are repeated, without the knowledge or consent of the licensee, on sites other than the site on which they were originally placed. However, Chapter 410, Sections 1 and 13(3) do require that advertising initially placed by the designated broker or affiliated licensee on the internet must prominently display or present the trade name and contact information of the agency, regardless of the ad template used or any display limitations imposed by the site operator. In response to the query posed by commenter Fish, these requirements do apply to advertisements or solicitations posted in the context of discussions or groups on social networking sites, which may be addressed to significant numbers of people.⁶ Whether or not a post or communication on a social networking site will be deemed to be an advertisement or solicitation will depend on the content, context and primary purpose of the post or communication.

⁶ See the definition of “advertising” in Chapter 410, Section 1(1)(A).

The re-write of Section 13(3) offered by commenter Coit is more compact than the text of the proposed rule. The Commission accepts his text with minor formatting changes. In addition, the Commission has replaced the phrase “knowledge and consent” with simply “consent.” The re-worked section will appear in the re-advertised proposed rule as follows:

3. Domain Names and Web Sites

An affiliated licensee may not directly or indirectly, through himself or others—

- register a domain name for a web site, or
- develop or upload to the internet a web site,

that promotes real estate brokerage services or the sale or purchase of real estate through the agency with whom the licensee is affiliated without the consent of the designated broker.

Any web site developed or uploaded under this Section must comply with the advertising requirements contained in Chapter 410, Section 1.